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You Can't Touch This: A Lession to Legislators on Political Speech

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YOU CAN'T TOUCH THIS: A LESSON TO LEGISLATORS ON POLITICAL SPEECH

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"Free speech is the whole thing, the whole ball game. Free speech is life itself."[1] Yet, in America, as Supreme Court Justice Clarence Thomas eloquently argued, we now face a perverse anomaly in First Amendment jurisprudence.[2] According to the Supreme Court, the First Amendment protects the Ku Klux Klan leader who advocates lawlessness,[3] the protester who sews "f*** the [d]raft" on his jacket,[4] the pornographer who transmits nudity via the Internet,[5] the business that distributes virtual child sex acts,[6] and a dancer who wants to perform nude in a bar-room type setting.[7] And now, as Congress has successfully passed campaign finance legislation banning political speech, are we to believe that the First Amendment does not protect the speech of political associations during an election campaign? Such a notion should be

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1. *Salman Rushdie in Hiding*, GUARDIAN (London), Nov. 8, 1990, at 23; *see also* Richard A. DiLiberto, Jr., *Free Speech is Worth Guarantee*, NEWS J. (Delaware), Mar. 4, 2002, at A7.

2. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 411–12 (2000) (Thomas, J., dissenting).

3. Brandenburg v. Ohio, 395 U.S. 444 (1969).

4. Cohen v. California, 403 U.S. 15, 26 (1971).

5. Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).

6. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

7. Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).

offensive to every American. As noted by campaign finance expert James Bopp, Jr., "[t]he First Amendment was adopted not to protect nude dancing or virtual child pornography, but was intended to protect political speech."[8] The Supreme Court declared that the "First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office."[9]

This article focuses on the constitutional sanctity of issue advocacy communications[10] and why legislation that regulates

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8. Amy Keller, *Campaign Reform Foes Cheered by Minnesota Case*, ROLL CALL, July 11, 2002, *available at* 2002 WL 8126303; *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 411 (2000) (Thomas, J., dissenting). In his dissent, Justice Thomas stated:

> Political speech is the primary object of First Amendment protection. The Founders sought to protect the rights of individuals to engage in political speech because a self-governing people depends upon the free exchange of political information. And that free exchange should receive the most protection when it matters the most—during campaigns for elective office.

Id. (citations omitted).

9. Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 223 (1989) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)); *see also* Buckley v. Valeo, 424 U.S. 1, 14 (1976). In *Buckley*, the Court warned:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Id. (quoting Roth v. U.S., 354 U.S. 476, 484 (1957) (citation omitted)).

10. Issue advocacy communications are those communications that discuss a candidate and his position on issues but do not contain express or explicit words advocating the election or defeat of a candidate. *Buckley*, 424 U.S. at 41–44. In *Buckley*, the Supreme Court distinguished issue advocacy from express advocacy and held that communications that discuss a candidate and his views are constitutionally protected as long as they remain outside the narrow category of express advocacy. *Id.* at 43; *see also* Wanda Franz & James Bopp, Jr., *The Nine Myths of Campaign Finance Reform*, 10 STAN L. & POL'Y REV. 63, 63 (1998) ("*Buckley* held that political expenditures promoting a

such speech is a "direct violation of the people's right to free political speech, the right guaranteed to us by the First Amendment of the Bill of Rights in the Constitution of the United States of America."[11] Part I discusses the constitutionality of the newly passed federal campaign finance law, the Bipartisan Campaign Reform Act of 2002 ("BCRA"),[12] in regards to its prohibition of "electioneering communications," which is broadly defined to encompass issue advocacy communications. Part II focuses on North Carolina's three failed attempts to regulate issue advocacy communications. This article serves as a lesson to legislators: issue advocacy communications are constitutionally sacrosanct and the regulation of such is unconstitutional.

I. THE BCRA REGULATES THE HEART OF POLITICAL SPEECH—ISSUE ADVOCACY COMMUNICATIONS

The Supreme Court will likely soon consider the constitutionality of the BCRA.[13] This act was passed by the House

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candidate and his views are entitled to full First Amendment protection, so long as they remain outside the narrowly circumscribed category of express advocacy.").

11. 147 Cong. Rec. S3024 (2001) (statement of Sen. DeWine).

12. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (Mar. 27, 2002) (to be codified at 2 U.S.C. § 431). According to Kenneth Doyle, the BCRA

> is the biggest change in the nation's campaign finance statutes since 1974, the year the Watergate scandal reached its climax with President Nixon's resignation. Enactment of the measure came about through a special alignment of the stars. After a long, hard-fought, and increasingly pragmatic lobbying effort by reform groups—such as Common Cause and others . . . .

Kenneth Doyle, *By Any Name, New Law is Biggest Change in Campaign Finance Since Watergate,* BNA, DAILY REPORT FOR EXECUTIVES, CAMPAIGN FINANCE TRANSFORMED, Apr. 22, 2002, at S–5.

13. A legal challenge to the BCRA is currently before a three-judge panel of the federal district court in Washington D.C. The litigation is known as *McConnell v. FEC,* No. 02-0582 (D.D.C. filed Mar. 27, 2002). Pursuant to the BCRA, a district court decision can be appealed directly to the United States

and Senate respectively on February 14, 2002 and March 20, 2002, and signed by the President into law on March 27, 2002.[14] Notwithstanding the constitutional mandate that "Congress shall make no law . . . abridging the freedom of speech,"[15] the effect and purpose of the BCRA is to regulate core political speech, which lies at the heart of First Amendment freedoms, and limit the citizenry's right to speak out on political issues. Instead of abiding by the First Amendment, Congress did the exact opposite by enacting a law that abridges the freedom of speech. Campaign finance reformers ("reformers") must somehow think that the Constitution does not apply to political speech and speaking out on public issues is unimportant. Although the BCRA has several constitutional impediments, this article will discuss its biggest constitutional flaw—the regulation and outright prohibition of issue advocacy.[16]

Supreme Court. § 403(a)(3), 116 Stat. at 114 (to be codified at 2 U.S.C. § 437(h)).

14. *See* Dan Balz, *In Long Battle, Small Victories Added Up,* WASH. POST, Mar. 21, 2002, at A1; David Lightman, *Finance Reform Passes in House; Shays-Meehan Bill Changes How Money Is Raised, Spent,* HARTFORD COURANT (Connecticut), Feb. 14, 2002, at A1; Mary McGrory, *McCain-Feingold Follies,* WASH. POST, Mar. 28, 2002, at A29.

15. U.S. CONST. amend. I.

16. President George W. Bush even has serious doubts as to the constitutionality of the "electioneering communication" prohibition. When he signed the act into law, he issued a statement saying:

> I believe individual freedom to participate in elections should be expanded, not diminished; and when individual freedoms are restricted, questions arise under the First Amendment. I also have reservations about the constitutionality of the broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election. I expect that the courts will resolve these legitimate legal questions as appropriate under the law.

President Signs Campaign Finance Reform Act, 38 WEEKLY COMP. PRES. DOC. 473 (Mar. 27, 2002).

A. How it Works

Consider the following hypothetical situations that illustrate the grave effects that the BCRA has on political speech:[17]

- The Sierra Club is criminally prohibited from running an advertisement on the radio within sixty days of a general election that merely informs the relevant electorate that "congressional candidate X is not in favor of increasing federal air pollution standards," even though the advertisement does not expressly advocate for the candidate's election or defeat.[18]
- Although pro-union legislation is scheduled for congressional vote thirty days before an incumbent's primary election, the AFL-CIO is criminally prohibited from airing a television advertisement simply urging the relevant electorate to call its Congressman to vote in favor of the legislation.[19]
- A corporation is criminally prohibited from educating the public on legislation by referring to the legislation by its popular name. For example, if the BCRA were in effect last year, it would have been a crime for a corporation to air an advertisement on television sixty-days prior to a general election that states: "The McCain-Feingold proposal will end the most egregious problems in the current campaign finance system. At the heart of the McCain-Feingold proposal is an end to the hundreds of millions of dollars in soft money contributions, the most corrupting money in politics today."[20]
- Sixty days before a general presidential election, Dan Rather may state on a television broadcast that "George W. Bush is pro-life. He wants to raise taxes. He has become

17. All of the following scenarios are in the federal election context.

18. *See* § 201(a), 116 Stat. at 88 (to be codified at 2 U.S.C. § 434(f)); § 312(a), 116 Stat. at 106 (to be codified at 2 U.S.C. § 437g(d)(1)(A)).

19. *See* § 201(a), 116 Stat. at 88 (to be codified at 2 U.S.C. § 434); § 312(a), 116 Stat. at 106 (to be codified at 2 U.S.C. § 437g(d)(1)(A)).

20. *See* § 201(a), 116 Stat. at 88; § 312(a), 116 Stat. at 106.

> soft on terrorism. And prescription drugs for senior citizens is the least of President Bush's concerns."[21]

Senator McCain frankly summed up the effects of the new law:

> Our bill establishes a so-called bright line test 60 days out from a [general] election. Any [issue ad] that falls within that 60-day window could not use a candidate's name or likeness. Ads could run which advocate any number of causes. Pro-life ads, pro-choice ads, anti-labor ads, pro-wilderness ads, pro-Republican Party ads, pro-Democrat Party ads—all could be aired in the last 60 days [before a general election]. However, ads mentioning the candidates could not.[22]

Despite the shocking nature of such a premise that Congress would ban political speech, the BCRA does exactly that. The BCRA makes it illegal for a private citizen of this great country to merely mention a candidate's name through the broadcast media at a time when free speech matters most—right before an election. Now, the only individuals who are legally permitted to use television or radio to discuss a candidate or the candidate's position on issues when it counts the most are the media and the candidates themselves.[23]

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21. *See* § 201(a), 116 Stat. at 88 (to be codified at 2 U.S.C. § 434(f)(3)(B)(i)(3)).

22. 143 CONG. REC. 10,002 (1997) (statement of Sen. McCain).

23. *See* 147 CONG. REC. 3,024 (2001) (statement of Sen. DeWine). Senator DeWine has accurately described this problem:

> [The BCRA] silences [the voices of the people] at a time when it is most important for those voices to be heard. It restricts citizens' ability to use the broadcast media to hold incumbents accountable for their voting records. It says essentially that the only people who have a right to the most effective form of political speech, the only people allowed to use television or radio to freely express an opinion or to take a stand on an issue when it counts, when it is within days of an election, are the candidates themselves and the news media.

Id.

B. *BCRA's Statutory Provisions*

The BCRA prohibits an "electioneering communication" by labor unions and all corporations, including 501(c)(4) nonprofit corporations and nonprofit ideological corporations, that accept no more than *de minimis* contributions.[24] Section 201(a) of the BCRA defines "electioneering communication" as follows:

> [A]ny broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office . . . 60 days before a general, special, or runoff election for the office sought by the candidate; or . . . 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and . . . in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.[25]

In an apparent recognition of the unconstitutionality of the above provision, the BCRA provides an alternative definition of "electioneering communication" to be substituted in the event that

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24. § 203(a), 116 Stat. at 91 (to be codified at 2 U.S.C. § 441(b)(2)). The prohibition found in section 203(a) plainly applies to all corporations, including 501(c)(4) organizations. Section 203(c), however, appears to create an exception, permitting 501(c)(4) organizations to make "electioneering communications" provided that "the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence." § 203(c), 116 Stat. at 91. However, section 204 states that the exception does not apply if the communication is "targeted"—broadcast to voters for the named candidate. § 204, 116 Stat. at 92 (adding § 316(c)(6) of Federal Election Campaign Act). This effectively nullifies the exception provided in section 203(c) since "target[ing] to the relevant electorate" is a prerequisite for a communication to constitute an "electioneering communication." § 201(a), 116 Stat. at 88 (to be codified at 2 U.S.C. § 434(f)(3)(A)(i)).

25. § 201(a), 116 Stat. at 88 (to be codified at 2 U.S.C. § 434(f)(3)(A)(i)).

the above provision is "held to be constitutionally insufficient by final judicial decision."[26] That alternative definition provides:

> [A]ny broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.[27]

Violations of these above provisions can result in a prison sentence and a substantial fine.[28]

It is also important to note that "[t]he term electioneering does not include . . . a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate."[29] As a result, at a time when all other organizations are prohibited from merely referring to a candidate, media companies may broadcast as many of their own "electioneering communications" and programs as they like. The media companies can go as far as endorsing candidates for elections and talking adversely about other candidates while editorializing on particular issues. In other words, a nonprofit corporation, like the Sierra Club—funded by annual dues from its members starting at $25 each—is prohibited from even referring to a candidate; whereas, Rupert Murdoch's FOX Network is free to use its general treasury funds to endorse its

26. *Id.* (to be codified at 2 U.S.C. § 434(f)(3)(A)(ii)).

27. *Id.* Much to the dismay of the reformers, but certainly not a revelation, this alternative definition is also an unconstitutional regulation of issue advocacy. *See infra* notes 82–85 and accompanying text.

28. § 312(a), 116 Stat. at 106 (to be codified at 2 U.S.C. § 437g(d)(1)(A)). A violator may receive a maximum prison sentence from one to five years and may be fined a substantial amount since the BCRA does not cap the amount of any fine. *Id.*

29. § 201(a), 116 Stat. at 88 (to be codified at 2 U.S.C. § 434(f)(3)(B)(i)).

own candidates.[30] Under the BCRA, the public will now only hear those viewpoints that the broadcast media deem worthy of consideration.

C. *The BCRA's ban on corporations and labor unions making an "electioneering communication" is an unconstitutional regulation of issue advocacy*

The BCRA effectively regulates what the Constitution intended to protect: political speech. Recently, in *Republican Party of Minnesota v. White,*[31] the Supreme Court proclaimed:

> [T]he notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. "[D]ebate on the qualifications of candidates" is "at the core of our electoral process and of the First Amendment freedoms," not at the edges.[32]

James Bopp, Jr. and Richard Coleson accurately point out that the "BCRA would virtually destroy the ability of citizen groups to participate in our republic, thereby trampling on freedom of speech and association with respect to the most vital issues of our day."[33] As demonstrated below, the Supreme Court and the lower federal courts have been quite clear; regulation of issue advocacy is unconstitutional. Therefore, both "electioneering communication" prohibitions run afoul of the First Amendment.

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30. In *First Nat'l Bank v. Belotti,* 435 U.S. 765 (1978), the Supreme Court rejected the proposition that a "communication [made] by corporate members of the institutional press is entitled to greater protection than the same communication [made] by [non-media companies]." *Id.* at 782 n.18.

31. 122 S. Ct. 2528 (2002).

32. *Id.* at 2538 (quoting Eu v. San Francisco Democratic Cent. Comm., 489 U.S. 222–23 (1989)) (emphasis in original).

33. James Bopp Jr. & Richard E. Coleson, *Fatal Flaws in the Bipartisan Campaign Reform Act of 2002,* BNA, DAILY REPORT FOR EXECUTIVES, Apr. 22, 2002, at S–21, S–30.

1. Free expression is vital and essential to representative government.

In the seminal case of *Buckely v. Valeo*,[34] the Supreme Court expressed why issue advocacy communications need to be free and unfettered from regulation. The Court held that

34. 424 U.S. 1 (1976). In a Congressional Research Service (CRS) Report for Congress, L. Paige Whitaker succinctly describes the holding of *Buckley v. Valeo*:

> In the 1976 landmark decision, *Buckley v. Valeo*, the Supreme Court provided the genesis for the concept of issue and express advocacy communications. In *Buckley*, the Court evaluated the constitutionality of provisions of the Federal Election Campaign Act (FECA) that applied to expenditures "relative to a clearly identified candidate" and "for the purpose of influencing an election." The Court found that such provisions did not provide a sufficiently precise description of what conduct was regulated and what conduct was not regulated, in violation of First Amendment "void for vagueness" jurisprudence. Furthermore, the Court was concerned, under the overbreadth doctrine, that the statute could encompass not only communications with an electoral connection, but could encompass constitutionally protected issue-based speech as well. In order to avoid these vagueness and overbreadth problems, the Court held that the government's regulatory power under FECA would be construed to reach only those funds spent for communications that "include express words of advocacy of the election or defeat" of a clearly identified candidate. Hence, the *Buckley* Court began to distinguish between communications that expressly advocate the election or defeat of a clearly identified candidate and those communications that advocate a position on an issue. The Court found that the latter type of communication is constitutionally protected First Amendment speech and that only "express advocacy" speech could be subject to regulation.

L. PAIGE WHITAKER, CONGRESSIONAL RESEARCH SERVICE, CAMPAIGN FINANCE REFORM: A LEGAL ANALYSIS OF ISSUE AND EXPRESS ADVOCACY 2 (Mar. 15, 2002) (on file with the First Amendment Law Review).

discussion of public issues and the qualifications of candidates is "integral to the operation of the system of government established by our Constitution."[35] It declared that "a major purpose" of the First Amendment was to protect such political expressions to ensure the unfettered exchange of ideas, which would result in "political and social changes desired by the people."[36] In a nation where the people are sovereign, it is absolutely essential that the citizenry is able to make informed choices among the candidates for public office.[37] After all, the individuals elected to public office "inevitably shape the course that we follow as a nation."[38] Consequently, the Court issued a mandate that political discussion remain "uninhibited, robust, and wide-open."[39]

2. The Bright-Line "Express Advocacy" Test

The *Buckley* Court drew a bright-line distinction between express advocacy and issue advocacy. This bright-line test allows a speaker to determine what speech is subject to regulation. In the campaign finance context, communications may not be regulated unless they contain "express terms [that] advocate the election or defeat of a clearly identified candidate for federal office."[40] In *Buckley*, the Court provided examples of words that constitute such "express advocacy": " 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.' "[41]

The Court held that the citizenry should have the freedom to engage in such political speech to the fullest, so that it is

35. *Buckley*, 424 U.S. at 14.

36. *Id.* (quoting Roth v. U.S., 354 U.S. 476, 484 (1957)). The *Buckley* Court affirmed, "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Id.* at 15 (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

37. *Id.* at 14–15.

38. *Id.* at 15.

39. *Id.* at 14 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

40. *Id.* at 44.

41. *Id.* at 44 n.52.

"uninhibited, robust, and wide-open," without the fear of whether one's words cross the line into regulation.[42] A landowner is permitted to enjoy the full fruits of his land up to the boundary, without the fear of reprisal. Without a boundary, a landowner would fear encroaching upon his neighbor's land and would not use his land to the fullest. Likewise, without a bright-line test, a speaker would be afraid to speak out on issues of public importance, fearing that one's words would cross the line into regulation. Thus, the *Buckley* Court created a bright-line boundary to encourage free discussion of the issues, holding that "[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views."[43]

Reformers argue over and over that issue advertisements that go right up to the line but do not advocate the election or defeat of a candidate with express or explicit words are "sham" ads and should be regulated because they intend to influence an election result.[44] Such an argument is specious.[45] A political

42. *Id.* at 14.

43. *Id.* at 45.

44. One of these reformers, Senator John Edwards, stated:

> [S]ham issue ads . . . are a fraud under the campaign election laws that exist in this country. . . . I have one or two examples. This is an ad run in a congressional election in 1998: Announcer: The Daily reports criminals are being set free in our neighborhoods. In May, Congressman X voted to allow judges to let violent criminals out of jail, rapists, drug dealers, and even murderers. X's record on drugs is even worse. X voted to reduce penalties for crack cocaine. And in April, X voted to use your tax dollars to give free needles to illegal drug users. Call X. Tell him he's wrong. Dangerous criminals belong in jail. This doesn't use the language used as illustrative by the U.S. Supreme Court in Buckley. It doesn't say 'vote for;' it doesn't say 'elect;' it says 'call.' But any rational person, including all the people who watched this ad on television, know that this ad is aimed at defeating Congressman X in the campaign. That is exactly what it is about.

advertisement does not fall within the purview of regulation simply because it intends to influence an election but avoids using express or explicit words of advocacy.

The Court drew a bright line that errs on the side of permitting communications that affect the election process but "at all costs avoids restricting in any way, discussion of public issues."[46] The purpose and advantage of such a rigid approach is to allow speakers to know at the outset what is permitted and what is prohibited.[47] Without such a rigid approach, there would be "no security for free discussion."[48] It would compel "the speaker to hedge and trim."[49] As recognized by the Fourth Circuit in *FEC v. Christian Action Network*,[50] the bright-line test was necessary "so that citizen participants in the political processes would not have their core First Amendment right to political speech burdened by apprehensions that their advocacy of issues might later be

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147 CONG. REC. 3,040 (2001) (statement of Sen. Edwards). Senator Susan Collins expressed a similar concern:

> Unfortunately, some courts have interpreted 'expressly advocating' to require that the ad use words such as 'vote for' or 'vote against' or 'elect' or 'defeat.' If the ad avoids those magic words and makes at least a passing reference to an issue, as the AFL-CIO did in Maine, those courts concluded that it does not expressly advocate the election or defeat of a candidate, and the union may run it. Mr. President, the situation I have described has led to the biggest sham in American politics. Nobody in Maine believe[s] that the AFL-CIO's negative ads were for any purpose other than the defeat of a candidate.

143 CONG. REC. 10,125 (1997) (statement of Sen. Collins).

45. *See* Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. LEGIS. 179, 184–89 (1998) (arguing that the reformers are "dramatically wrong" in advocating that issue advertisements that intend to influence elections but avoid using express words of advocacy can be regulated).

46. Me. Right to Life Comm. v. FEC, 914 F. Supp. 8, 12 (D. Me. 1996), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996).

47. *See id.* at 12.

48. *Buckley*, 424 U.S. at 43 (quoting Thomas v. Collins, 323 U.S. 516, 535 (1945)).

49. *Id.* (quoting *Thomas*, 323 U.S. at 535).

50. 110 F.3d 1049 (4th Cir. 1997).

interpreted by the government as, instead, advocacy of election result."[51]

The reformers behind the BCRA are unabashed in their motives. They do not like the content of issue advocacy communications that are broadcast on radio and television before an election; thus, it was their design to gag the mouths of the citizenry by creating a ban on issue advocacy. The reformers simply do not like "negative" ads. Senator Tom Daschle called issue advocacy the "'crack cocaine' of negative ads" because it is both "potent" and "deadly."[52] Senator John McCain exclaimed, "[t]hese [issue] ads are almost always negative attacks on a candidate and do little to further healthy political debate. As we all know, they are usually intended to defeat a candidate."[53] Senator Maria Cantwell boldly admitted that the BCRA *is about* inhibiting the ability of outside interest groups from discussing a candidate in a negative manner through the broadcast media.[54]

Notwithstanding the reformers dislike for negative ads, it is clear that issue advocacy may influence the outcome of elections. The *Buckley* Court noted that the "distinction between discussion of issues and candidates and advocacy of election or defeat of

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51. *Id.* at 1051.

52. 143 CONG. REC. 9,999 (1997) (statement of Sen. Daschle).

53. 143 CONG. REC. 10,002 (1997) (statement of Sen. McCain).

54. 148 CONG. REC. S2,117 (daily ed. Mar. 20, 2002) (statement of Sen. Cantwell) ("This [McCain-Feingold] bill is about slowing the ad war. It is about calling sham issue ads what they really are. It is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate the airwaves."); *see also* 145 CONG. REC. 12,606–07 (1999) (statement of Sen. Wellstone) ("I think these issue advocacy ads are a nightmare. I think all of us should hate them . . . . [T]hey just bash you and then they say: Call Senator So-and-so . . . . So with one stroke . . . [w]e could get some of this poison politics off television."); 144 CONG. REC. 917 (1998) (statement of Sen. Jeffords) ("We are talking about a system which has developed over the past couple of years which has seriously imposed upon us unfairness as far as candidates are concerned who find themselves faced with ads . . . to change the election."); 144 CONG. REC. 10,419 (1997) (statement of Sen. Wendell Ford) (stating that McCain-Feingold addresses the problem of issue ads, which he describes "as a new—and sometimes devious—way that unregulated money is issued to affect elections").

candidates may often dissolve in practical application."[55] The Court recognized that candidates are closely tied to public issues.[56] The Court further explained:

> Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, as well as more positive efforts to influence public opinion on them, *tend naturally and inexorably to exert some influence on voting at elections*.[57]

In striking down the Federal Election Campaign Act's ceiling on independent expenditures (which had been construed narrowly to implicate only express advocacy), the *Buckley* Court assumed for the sake of argument that large independent expenditures posed a threat of corruption.[58] Nonetheless, the Court held that the limit was not narrowly tailored to prevent corruption because unlimited sums could still be spent on communications that did not contain express advocacy, which, nonetheless, are made to support candidates:

> [A]ssuming, arguendo, that large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions, § 608(e)(1) does not provide an answer that sufficiently relates to the elimination of those dangers. Unlike the contribution limitations' total ban on giving large amounts of money to candidates, § 608(e)(1) prevents only some large expenditures. *So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly*

55. Buckley v. Valeo, 424 U.S. 1, 42 (1976).

56. *Id.*

57. *Id.* at 42 n.50 (citing Buckley v. Valeo, 519 F.2d 821, 875 (D.C. Cir. 1975)) (emphasis added).

58. *Id.* at 45.

> *identified candidate, they are free to spend as much as they want to promote the candidate and his views.*[59]

Like it or not, in America, the citizenry is free to criticize candidates and discuss issues relating to candidates. The reformers have attempted to prohibit the citizenry from broadcasting an advertisement that holds them accountable for their actions. It is clear that the new law was intended to insulate incumbent officeholders from criticism. House Majority Leader Tom Delay

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59. *Id.* (emphasis added). The Supreme Court has held that when a law burdens core political speech, the "exacting scrutiny" standard applies to ensure that the regulation is "narrowly tailored" to an "overriding state interest." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995). The only legitimate and compelling governmental interest that the Supreme Court has recognized is the "prevent[ion] [of] corruption or the appearance of corruption." FEC v. Nat'l Conservative PAC, 470 U.S. 480, 496–97 (1985). Spending money on issue advocacy communications does not implicate the state interest of avoiding *quid pro quo* corruption of candidates or the appearance thereof and, therefore, cannot be regulated. *Buckley*, 424 U.S. at 39–44; First Nat'l Bank v. Bellotti, 435 U.S. 765, 790 (1978). The Supreme Court has even rejected limits on independent expenditures, communications expressly advocating the election or defeat of a candidate, on *three separate occasions* because only large monetary contributions to a candidate present the risk of quid pro quo corruption. *See* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 617 (1996); *Nat'l Conservative PAC*, 470 U.S. at 498; *Buckley*, 424 U.S. at 45–50. In *Buckley*, the Supreme Court stated:

> Unlike contributions [made to candidates], . . . independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. *The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.*

424 U.S. at 47 (emphasis added); *see also Colorado Republican*, 518 U.S. at 616 (citing the same); *Nat'l Conservative PAC*, 470 U.S. at 497 (quoting the same). Thus, there is no recognized compelling governmental interest that justifies the mere scintilla of regulation of issue advocacy communications, let alone the outright prohibition of such communications as proscribed by the BCRA.

correctly points out that the BCRA simply "strengthens incumbents and makes it far harder for their constituents to hold them accountable."[60] Senator Santorum has also noted the reformer's goal of shielding incumbents. "If you do not think this is an incumbent protection plan, I guarantee you have not been listening. This is all about protecting incumbents."[61] The reformers are under the misapprehension that when they run for office it is "their election" and that the citizenry is not free to criticize incumbents.[62] That is not what the Constitution and Supreme Court precedent provide.

Issue advocacy is afforded absolute protection under the First Amendment;[63] only express advocacy, a very narrow class of political speech, can be regulated.[64] The Supreme Court reaffirmed this rule in *FEC v. Massachusetts Citizens for Life*,[65] and the federal courts of appeal have faithfully followed suit,[66]

60. 148 CONG. REC. 342 (2002) (statement of Rep. DeLay).

61. 148 CONG. REC. 2,132 (2002) (statement of Sen. Santorum).

62. *Id.*

63. *See* James Bopp, Jr. & Richard E. Coleson, *The First Amendment Needs No Reform: Protecting Liberty From Campaign Finance "Reformers,"* 51 CATH. U.L. REV. 785, 836–37 (2002).

64. *Buckley*, 424 U.S. at 80.

65. 479 U.S. 238, 248–49 (1986). The Court held that an expenditure must constitute express advocacy to be subject to the FECA prohibition against corporate use of treasury funds to make an expenditure "in connection with" any federal election. *Id.* The Court noted that the *Buckley* Court adopted the "express advocacy" test to distinguish discussion of issues and candidates, which is constitutionally protected under the First Amendment, "from more pointed exhortations to vote for particular persons." *Id.* at 249.

66. *See* Va. Soc'y for Human Life v. FEC, 263 F.3d 379, 383 (4th Cir. 2001); Citizens for Responsible Gov't State PAC v. Davidson, 236 F.3d 1174, 1186–87 (10th Cir. 2000); Perry v. Bartlett, 231 F.3d 155, 160 (4th Cir. 2000); Vt. Right to Life Comm. v. Sorrell, 221 F.3d 376, 387 (2d Cir. 2000); Iowa Right to Life Comm. v. Williams, 187 F.3d 963, 969–70 (8th Cir. 1999); N.C. Right To Life, Inc. v. Bartlett, 168 F.3d 705, 712–13 (4th Cir. 1999); Va. Soc'y For Human Life, Inc. v. Caldwell, 152 F.3d 268, 270 (4th Cir. 1998); Brownsburg Area Patrons Affecting Change v. Baldwin, 137 F.3d 503, 506 (7th Cir. 1998); FEC v. Christian Action Network, 110 F.3d 1049, 1051 (4th Cir. 1997); Me. Right To Life Comm. v. FEC, 914 F. Supp. 8, 12 (D. Me. 1996), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996); FEC v. Christian Action Network, 894 F. Supp. 946, 951 (W.D. Va. 1995), *aff'd per curiam*, 92 F.3d 1178 (4th Cir. 1996); Faucher v. FEC, 928 F.2d 468, 472 (1st Cir. 1991); FEC v. Furgatch, 807

along with numerous federal district courts.[67] Not one federal court has held that the bright-line test should be expanded to include communications beyond express or explicit words advocating the election or defeat of a candidate, consistently rejecting all legislative attempts to regulate issue advocacy.

Some commentators believe that *Furgatch v. FEC*,[68] a Ninth Circuit decision, expands the "express advocacy" test

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F.2d 857, 860 (9th Cir. 1987); FEC v. Cent. Long Island Tax Reform Immediately Comm., 616 F.2d 45, 53 (2d Cir. 1980) (en banc).

67. *See* N.C. Right to Life, Inc. v. Leake, No. 5:99-CV-798-BO3, at 9–11 (E.D.N.C. Oct. 24, 2001) (order granting plaintiffs' motion for summary judgment and denying defendant's motion for summary judgment) (on file with the First Amendment Law Review); Oklahomans for Life, Inc. v. Luton, CIV-00-1163C (W.D. Okla. Nov. 8, 2001) (order declaring statutory definitions of "independent expenditures," "contribution," and "political action committee" unconstitutional) (on file with the North Carolina First Amendment Law Reviw); Cmty. Alliance for a Responsible Env't v. Leake, No. 5:00-CV-554-BO(3), at 17 (E.D.N.C. Feb. 18, 2001) (order granting in part and denying in part motion for temporary restraining order and preliminary injunction) (on file with the First Amendment Law Review); Va. Soc'y for Human Life v. FEC, 83 F. Supp. 2d 668, 676 (E.D. Va. 2000); S.C. Citizens for Life, Inc. v. Davis, No. 3:00-124-19, at 4–5 (D.S.C. Feb. 9, 2000) (order granting preliminary injunction) (on file with the First Amendment Law Review); FEC v. Christian Coalition, 52 F. Supp. 2d 45, 62 (D.D.C. 1999); Kansans for Life, Inc. v. Gaede, 38 F. Supp. 2d 928, 935 (D. Kan. 1999); Fla. Right to Life v. Mortham, No. 98-770-CIV-ORL-19A, at 11 n.8, n.9 (M.D. Fla. Dec. 15, 1999) (order granting in part and denying in part motion for summary judgment) (on file with the First Amendment Law Review); FEC v. Freedom's Heritage Forum, No. 3:98 CV-549-S, at 5–8 (W.D. Ky. Sept. 29, 1999) (order granting in part and denying in part motion to dismiss); Right to Life of Mich., Inc. v. Miller, 23 F. Supp. 2d 766, 767 (W.D. Mich. 1998); Planned Parenthood Affiliates of Mich., Inc. v. Miller, 21 F.Supp. 2d 740, 742–43 (E.D. Mich. 1998); Right To Life of Dutchess County, Inc. v. FEC, 6 F. Supp. 2d 248, 249–50 (S.D.N.Y. 1998); Clifton v. FEC, 927 F. Supp. 493, 496 (D. Me. 1996), *aff'd*, 114 F.3d 1309 (1st Cir. 1997); West Virginians For Life, Inc. v. Smith, 919 F. Supp. 954, 959 (S.D. W. Va. 1996); FEC v. Survival Educ. Fund, Inc., 1994 WL 9658, at *3 (S.D.N.Y. Jan. 12, 1994), *aff'd in part and rev'd in part*, 65 F.3d 285 (2d Cir. 1995); FEC v. Colo. Republican Fed. Campaign Comm., 839 F. Supp. 1448, 1456 (D. Colo. 1993), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded*, 518 U.S. 604 (1996); FEC v. Nat'l Org. for Women, 713 F. Supp. 428, 433 (D.D.C. 1989); FEC v. Am. Fed'n of State, Courtyard Mun. Employees, 471 F. Supp. 315, 316–17 (D.D.C. 1979).

68. 807 F.2d 857 (9th Cir. 1987).

beyond express or explicit words. This is simply not true. The holding in *Furgatch* requires that for a communication to be deemed express advocacy and thus subject to regulation, it must "present a clear plea for action."[69] When determining whether regulation of political speech is permissible, moreover, the emphasis must always be on the literal words of the communication.[70] The *Furgatch* court held that explicit words of advocacy are required to support regulation of political speech regarding candidates.[71]

In *Furgatch*, the Federal Election Commission brought suit against Harvey Furgatch, who had placed a newspaper advertisement that was critical of President Jimmy Carter in the New York Times one week prior to the 1980 presidential election.[72] The Ninth Circuit focused its decision on the words of the advertisement, holding that "Don't Let Him Do It" was a "clear plea for action" that expressly advocated Carter's defeat.[73] The words were "simple and direct" words of "command," which " 'expressly advocate[d]' action of some kind."[74] The Ninth Circuit pointed out that "speech that is merely informative" was not regulated by the Act.[75]

The *Furgatch* court focused on the literal words, concluding that the language of Furgatch's advertisement "expressly advocated" by issuing a "command" that the public vote against Carter.[76] In fact, the court pointedly noted that "context cannot supply a meaning that is incompatible with, or

69. *Id.* at 864.

70. *Id.* at 861–62.

71. *Id.*; *see also Christian Action Network*, 110 F.3d at 1053 ("[T]he entire premise of the [Furgatch] court's analysis was that words of advocacy such as those recited in footnote 52 [in *Buckley*] were required to support Commission jurisdiction over a given corporate expenditure.").

72. *Furgatch*, 807 F.2d at 857–58.

73. *Id.* at 864–65; *see also Christian Action Network*, 110 F.3d at 1053 ("The court's almost exclusive focus on 'speech,' and specifically 'speech' defined as the literal words or text of the communication, could not have been any clearer . . . .").

74. *Furgatch*, 807 F.2d at 864; *see also Christian Action Network*, 110 F.3d at 1054.

75. *Furgatch*, 807 F.2d at 864.

76. *Id.*; *see also Christian Action Network*, 110 F.3d at 1054.

simply unrelated to, the clear import of the words."[77] Moreover, a communication's effect upon a listener is irrelevant when considering whether there is a clear plea for action advocating the election or defeat of a candidate, through literal, express or explicit words.[78] Thus, the *Furgatch* court did not expand the *Buckley* standard; literal, express or explicit words of advocacy are required before a political communication can be regulated.[79]

Because both the primary and alternative "electioneering communications" definitions found in the BCRA not only regulate issue advocacy communications, but explicitly ban them 60 days before a general election and 30 days before a primary election, both definitions run blatantly afoul of *Buckley* and are facially unconstitutional. Both statutes unabashedly ban communications that do not expressly advocate the election or defeat of a clearly identified candidate through express or explicit words.

First, the primary definition bans speech that merely "refers" to a candidate, effectively sweeping in all issue advocacy communications and ignoring the bright-line "express advocacy" test.[80] Thus, it is clearly an unconstitutional regulation of issue advocacy communications.[81] Second, although it was intended to

77. *Furgatch*, 807 F.2d at 864.

78. *See* Iowa Right to Life Comm. v. Williams, 187 F.3d 963, 969 (8th Cir. 1999) ("Questions of intent and effect, however, are to be excluded from the [express advocacy] analysis, since a speaker, in such circumstances, could not safely assume how anything he might say would be understood by others.").

79. In fact, the *Furgatch* court noted that the statute at issue only regulated "advocacy" that amounted to a clear plea for action. *Furgatch*, 807 F.2d at 864. It further noted that "speech that is merely informative is not covered by the Act." *Id.*

80. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201(a), 116 Stat. 81, 88 (Mar. 27, 2002) (to be codified at 2 U.S.C. § 434(f)(3)(A)(i)).

81. *See* Right to Life of Mich., Inc. v. Miller, 23 F. Supp. 2d 766, 766 (W.D. Mich. 1998); Planned Parenthood Affiliates of Mich., Inc. v. Miller, 21 F. Supp. 2d 740, 745–46 (E.D. Mich. 1998) (holding that a similar rule that banned corporate and labor union communications made within 45 days of an election that merely contained the "name or likeness of a candidate" was an unconstitutional regulation of issue advocacy); *see also* Buckley v. Valeo, 424 U.S. 1, 43–44 n.52 (1976) (listing examples of words that constitute express advocacy).

be a closer call constitutionally, the alternative definition does not even come close to passing constitutional muster. The definition explicitly sweeps in communications "regardless of whether . . . [they] expressly advocate a vote for or against a candidate."[82] Therefore, the alternative definition is also unconstitutional since it ignores the bright-line "express advocacy" test. However, even if it did not contain such issue advocacy inclusion language, the definition is ambiguous in what would constitute "an exhortation to vote for or against a specific candidate."[83] As the Eighth Circuit noted, "[q]uestions of intent and effect . . . are to be excluded from the [express advocacy] analysis, since a speaker, in such circumstances, could not safely assume how anything he might say would be understood by others."[84] Thus, the alternative definition is also unconstitutionally vague because ordinary people cannot know whether their speech constitutes an "electioneering communication."[85]

II. NORTH CAROLINA'S THREE FAILED ATTEMPTS TO REGULATE CONSTITUTIONALLY PROTECTED ISSUE ADVOCACY

Unfortunately, the campaign finance reformers behind the BCRA are not alone. Legislators throughout the country have attempted to regulate issue advocacy. However, federal courts, relying on *Buckley,* have routinely struck down this regulation.[86]

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82. § 201(a), 116 Stat. at 88 (to be codified at 2 U.S.C. § 434(f)(3)(A)(ii)).

83. *Id.*

84. Iowa Right to Life Comm. v. Williams, 187 F.3d 963, 969 (8th Cir. 1999).

85. A penal statute is void for vagueness if ordinary people cannot understand what conduct is prohibited and if the statute encourages arbitrary and discriminatory enforcement. Kolender v. Lawson, 461 U.S. 352, 357 (1983) (stating that "laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he can act accordingly"); *see also* Grayned v. Rockford, 408 U.S. 104, 108–09 (1972); Elliot v. Administrator, Animal and Plant Health Inspection Serv., U. S. Dep't of Agric., 990 F.2d 140, 145 (4th Cir. 1993) ("A law is considered vague if 'a person of normal intelligence must *guess at its meaning* and *differ as to its application.*'" (quoting Connally v. Gen. Constr., 269 U.S. 385, 391 (1926)) (emphasis added).

86. *See supra* notes 66–67.

The State of North Carolina attempted to regulate constitutionally protected issue advocacy on three separate occasions. All three times, the laws were stuck down as being an unconstitutional regulation of political speech.[87] North Carolina's unsuccessful efforts serve as a stark lesson to legislators: regulation of issue advocacy, in any way, is unconstitutional.

A. North Carolina's First Attempt

On September 27, 1996, North Carolina Right to Life, Inc. ("NCRL"), a 501(C)(4) nonprofit organization under the Internal Revenue Code, brought a pre-enforcement challenge to the constitutionality of North Carolina's definition of political committee on the grounds that it encompassed organizations that solely engaged in issue advocacy.[88] NCRL also alleged that its major purpose as defined in its articles of incorporation was not to nominate or elect candidates, but rather to educate North Carolinians regarding pro-life issues.[89] Prior to the 1996 general election, NCRL became concerned that if it issued its voter guide, which did not expressly advocate the election or defeat of a candidate, but merely discussed issues of public concern, including candidates' positions on those issues, it would be considered a political committee pursuant to section 163-278.6 (14) of the North Carolina General Statutes.[90]

Section 163-278.6(14) defined political committee as "a combination of two or more individuals, or any person, committee, association, or organization, the primary or incidental purpose of

87. *See* Perry v. Bartlett, 231 F.3d 155 (4th Cir. 2000) (holding that section 163.278.12A of the North Carolina General Statutes was unconstitutional because it defined "political committee" too broadly); N.C. Right To Life, Inc. v. Bartlett, 168 F.3d 705, 712–13 (4th Cir. 1999) (holding that section 163-278.6(14) was unconstitutionally overbroad because it regulated groups engaged in issue advocacy); N.C. Right to Life, Inc. v. Leake, No. 5:99-CV-798-BO(3) (E.D.N.C. Oct. 24, 2001) (order granting plaintiffs' motion for summary judgment and denying defendant's motion for summary judgment) (on file with the First Amendment Law Review).

88. *Bartlett*, 168 F.3d at 708–09.

89. *Id.* at 708.

90. *Id.* at 709.

which is to support or oppose any candidate or political party or to influence or attempt to influence the result of an election."[91] If NCRL was considered a political committee, the consequences would have been "substantial"–it would have been "required to register as such, keep detailed records of its expenditures and contributions, and file organizational and financial reports with the State."[92] The district court held that the political committee definition was unconstitutional.[93] In doing so, the court stated:

> Groups engaging only in issue advocacy are thus subject to spending restrictions and reporting requirements. This violates the First Amendment, as construed by the Supreme Court in *Buckley v. Valeo.* The *Buckley* Court noted that, while a statute may target "those expenditures that expressly advocate a particular election result," it may not target funds used for general issue advocacy. By this standard, section 163-278.6(14) is fatally overbroad: it does not limit its coverage to entities engaging in express advocacy.[94]

On appeal, the Fourth Circuit upheld the lower court's decision and struck down North Carolina's definition of "political committee."[95] The State attempted to lure the *federal* court into ignoring the *state* statute's plain terms and unauthoritatively narrowing it to cover only express advocacy communications.[96] The Fourth Circuit, however, stated that "[t]o accept the State's proffered interpretation would read references to influencing elections (a classic form of issue advocacy) right out of the

91. N.C. GEN. STAT. § 163-278.6 (14) (1995).

92. *Bartlett*, 168 F.3d at 712 (citing N.C. GEN. STAT. § 163-278.6(14), § 163-278.7(b), § 163-278.8, § 163-278.9, and § 163-278.11).

93. N.C. Right to Life, Inc. v. Bartlett, 3 F. Supp. 2d 675, 680 (E.D.N.C. 1998).

94. *Id.* at. 679–80 (internal citation omitted).

95. *Bartlett*, 168 F.3d at 713.

96. *Id.* at 710.

statute."[97] As a result, the Fourth Circuit concluded that the statute was overly broad because it regulated groups engaged in only issue advocacy as opposed to express advocacy of a candidate.[98]

B. *North Carolina's Second Attempt*

In response to the Fourth Circuit's ruling in *Bartlett*, the North Carolina legislature redesigned its campaign finance regime in 1999. This new scheme included a new "political committee" definition, section 163-278.6(14) of the North Carolina General Statutes. However, instead of complying with the constitutional boundaries set forth in the Fourth Circuit's decision, the legislature sought to circumvent the judicial determination. Thus, like the previous statute that was held unconstitutional, North Carolina's new definition of political committee swept within its ambit both groups that incidentally engaged in express advocacy and groups that solely engaged in issue advocacy.

In *North Carolina Right to Life, Inc. v. Leake*, NCRL again brought a pre-enforcement challenge to the constitutionality of North Carolina's definition of "political committee"[99] on the grounds that it encompassed organizations that engaged solely in

97. *Id.* at 713; *see also* BMW of N. Am. v. Gore, 517 U.S. 559, 577 (1996) ("[O]nly state courts may authoritatively construe state statutes."). The Supreme Court has noted:

> It has long been a tenet of First Amendment law that in determining a facial challenge to a [state] statute, if it be "readily susceptible" to a narrowing construction that would make it constitutional, it will be upheld. The key to application of this principle is that the statute must be "readily susceptible" to the limitation; we will not rewrite a state law to conform it to constitutional requirements.

Virginia v. Am. Booksellers, Inc., 484 U.S. 383, 397 (1988).

98. *Bartlett*, 168 F.3d at 713 (concluding that "burdening speech [in this manner] is unacceptable in an area of such crucial import to our representative democracy").

99. N.C. GEN. STAT. § 163-278.6(14) (1999).

issue advocacy.[100] It also challenged North Carolina's test for "support or oppose"[101] on the grounds that it encompassed issue advocacy communications and triggered the political committee definition.[102]

Section 163-278.6(14) defined "political committee" as an "organization, or other entity that makes, or accepts anything of value to make, contributions or expenditures and has one or more . . . [enumerated] characteristics."[103] One of these characteristics was that the entity "[h]as as a *major purpose* to support or oppose the nomination or election of one or more clearly identified candidates."[104] This major purpose was "rebuttably presumed" if the entity "contributes or expends or both contributes and *expends* during an election cycle more than . . . ($3,000)."[105] "Expend" was defined as "anything of value whatsoever . . . to *support or oppose* the nomination, election or passage of one or more clearly identified candidates, or ballot measure[s]."[106] "Major purpose" was not defined in section 163-278.6 of the article which regulates contributions and expenditures in political campaigns.[107]

To determine whether an organization spent money "to support or oppose the nomination or election of one or more clearly identified candidates,"[108] one was required to look at

100. N.C. Right to Life, Inc. v. Leake, No. 5:00-CV-798-BO(3), at 7–10 (E.D.N.C. Oct. 24, 2001); *see also* N.C. Right to Life, Inc. v. Leake, 108 F. Supp. 2d 498, 502 (E.D.N.C. 2000).

101. *See* § 163-278.14A.

102. The author represented NCRL in this litigation and conducted depositions of the following defense witnesses, the transcripts of which are on file with the First Amendment Law Review: Deposition of Gary Osborne Bartlett, N.C. Right to Life, Inc. v. Leake, No. 5:99-CV-798-BO(3) (E.D.N.C. Oct. 24, 2001); Deposition of Philip Baddour, N.C. Right to Life, Inc. v. Leake, No. 5:99-CV-798-BO(3) (E.D.N.C. Oct. 24, 2001); and Deposition of Wilbur Gulley, III, N.C. Right to Life, Inc. v. Leake, No. 5:99-CV-798-BO(3) (E.D.N.C. Oct. 24, 2001).

103. § 163-278.6(14).

104. *Id.* (emphasis added).

105. *Id.* (emphasis added).

106. § 163-278.6(9) (emphasis added).

107. *See* § 163-278.6.

108. § 163-278.6(14).

section 163-278.14A.[109] Under this section, explicit words of advocacy of the election or defeat of clearly identified candidates were only one means of establishing that an entity has spent money to support or oppose candidates.[110] The North Carolina Board of Elections was also permitted to look at the "essential nature" of the communication, and if the course of action was unclear, to review "contextual factors," such as: "the timing of the communication," "the distribution of the communication to a significant number of registered voters," and "the cost of the communication" using the standard of a "reasonable person['s]" interpretation.[111] Section 14A went even further by providing that the above factors were "not necessarily the exclusive or conclusive means[] of proving that an individual or other entity acted to 'support or oppose' " a clearly identified candidate.[112] Section 14A simply allowed the trier of fact to look at a number of subjective factors to determine whether a communication fell within subsection (a)(2).[113]

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109. § 163-278.14A.
110. § 163-278.14A(a)(1).
111. § 163-278.14A(a)(2).
112. § 163-278.14A.
113. Section 163-278.14A of the North Carolina General Statutes read:

> [e]ither of the following shall be means, *but not necessarily the exclusive or conclusive means*, of proving that an individual or other entity acted 'to support or oppose the nomination or election of one or more clearly identified candidates:
>
> (1) Evidence of financial sponsorship of communications to the general public that use phrases such as "vote for", "reelect", "support", "cast your ballot for", "(name of candidate) for (name of office)", "(name of candidate) in (year)", "vote against", "defeat", "reject", "vote pro-(policy position)" or "vote anti-(policy position)" accompanied by a list of candidates clearly labeled "pro-(policy position)" or "anti-(policy position)", or communications of campaign words or slogans, such as posters, bumper stickers, advertisements, etc., which say "(name of candidate)'s the One", "(name of candidate) '98", "(name of candidate)!, or the names of two candidates joined by a hyphen or slash.

Under North Carolina's scheme, "[t]he definition of 'political committee' ha[d] broad implications for the First Amendment rights of entities that are regulated as such, as well as for individuals that belong to and contribute them."[114] A political committee was required to appoint a treasurer,[115] who, in turn, was required to file a statement of organization,[116] keep detailed accounts of all contributions received and expenditures made,[117] and file periodic statements with the Board.[118] If an organization failed to comply with these requirements, it may have been subject to prosecution for a Class 2 misdemeanor,[119] as well as civil late-filing fines.[120]

NCRL claimed that because section 163-278.6(14) of the North Carolina General Statutes relied on section 163-278.14A(a)(2), which permitted the trier of fact to look at issue

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> (2) Evidence of financial sponsorship of communications *whose essential nature expresses electoral advocacy* to the general public and goes beyond a mere discussion of public issues in that they direct voters to *take some action* to nominate, elect, or defeat a candidate in an election. If the course of action is unclear, *contextual factors* such as the language of the *communication as a whole*, the *timing of the communication* in relation to the events of the day, the *distribution of the communication* to a significant number of registered voters for that candidate's election, and the *cost of the communication* may be considered in determining whether the action urged *could only be interpreted by a reasonable person* as advocating the nomination, election, or defeat of that candidate in that election.

Id. (emphasis added).

114. Cmty. Alliance for a Responsible Env't v. Leake, No. 5:00-CV-554-BO(3), at 8 (E.D.N.C. Feb. 18, 2001) (order granting in part and denying in part motion for temporary restraining order and preliminary injunction) (on file with the First Amendment Law Review).

115. § 163-278.7

116. § 163-278.9(a)(1).

117. § 163-278.8.

118. § 163-278.9(4(a)); § 163-278.11.

119. § 163-278.27.

120. § 163-278.22(14); § 163-278.34.

advocacy communications to determine whether a speaker supports or opposes the election of a candidate,[121] both sections were unconstitutional because they regulated issue advocacy.[122]

1. Section 163-278.6 (14) is declared an unconstitutional regulation of issue advocacy.

As discussed above, to determine whether an organization has spent money "to support or oppose the nomination or election of one or more clearly identified candidates," one was required to look at section 163-278.14A. Under this section, explicit words of advocacy of the election or defeat of a clearly identified candidate were only one means of establishing that an entity has spent money to *support or oppose* a candidate and thereby subjected itself to regulation as a political committee. Section 163-278.14A(a)(1) focused on the words of the communication—encompassing *all* communications that in express or explicit words advocate the election or defeat of a clearly identified candidate by including "communications to the general public that use phrases such as," followed by a non-exhaustive list of examples. Whereas, section 163-278.14A(a)(2) encompassed communications that do not contain express or explicit words advocating the election or defeat of a candidate, permitting the trier of fact to look beyond what is actually said in analyzing whether a speaker has made a communication that *supports or opposes the nomination or election of one or more clearly identified candidates.*[123]

121. *See* N.C. Right to Life, Inc. v. Leake, No. 5:99-CV-798-BO(3), at 5 (E.D.N.C. Oct. 24, 2001) (noting that once a communication is deemed to be "express advocacy" under section 163-278.14(a)(2), it will qualify as an "expenditure" for purposes of determining "political committee" status under section 163-278.6(14)).

122. Verified Complaint of Plaintiff at 2, N.C. Right to Life, Inc. v. Leake, No. 5:99-CV-798-BO(3) (E.D.N.C. Oct. 24, 2001).

123. Cmty. Alliance for a Responsible Env't v. Leake, No. 5:00-CV-554-BO(3), at 12–13 (E.D.N.C. Feb. 18, 2001) (order granting in part and denying in part motion for temporary restraining order and preliminary injunction) (on file with the First Amendment Law Review) ("[T]he 'essential nature' inquiry [found within section 163-278.14A(a)(2)] allow[ed] regulators to [look beyond express or 'explicit language' and] take into account certain 'contextual factors'

Therefore, section 163-278.6(14) fell within the purview of danger that the Fourth Circuit had warned against.[124] A group's "major purpose" could have been derived from the contextual factors listed in section 163-278.14A(a)(2), if the "essential nature" of the inquiry was unclear.[125] Thus, under North Carolina's definition of "political committee," if an organization used ads that did not contain express or explicit words advocating the election or defeat of a clearly identified candidate, it could have still been subject to regulation.[126]

One of the reasons the *Bartlett* court struck down North Carolina's previous political committee definition was because it "subject[ed] groups engaged in only issue advocacy to an intrusive set of reporting requirements."[127] In that case, the court recognized that such issue advocacy regulation " 'blankets with uncertainty' the entire field of campaign politics 'compelling the speaker to hedge and trim.' "[128] The Fourth Circuit issued a stern warning: "[b]urdening speech of this sort [issue advocacy] is unacceptable

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in deciding whether a communication is made to 'support or oppose' the nomination or election of a candidate.").

124. As the Fourth Circuit noted in *Perry v. Bartlett*:

> In an effort to alleviate uncertainty, the Supreme Court adopted a bright-line rule to determine when political expression may be regulated. This bright-line rule requires the use of express or explicit words of advocacy of the election or defeat of a candidate before the communication may be regulated.... The [Supreme] Court therefore refused to adopt a standard allowing regulation of any advertisement that mentions a candidate's stand on an issue.

231 F.3d 155, 160 (4th Cir. 2000) (citing Buckley v. Valeo, 424 U.S. 1, 42–43 (1976)).

125. *See Cmty. Alliance for a Responsible Env't*, No. 5:00-CV-554-BO(3), at 7.

126. N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 712 (4th Cir. 1999) (noting that "political committee [was] defined in such a way that it could [have been] interpreted to reach groups engaged purely in issue discussion.") (quoting *Buckley*, 424 U.S. at 79).

127. *Id.* at 713.

128. *Id.* (quoting Thomas v. Collins, 323 U.S. 516, 535 (1945)).

in an area of such crucial import to our representative democracy."[129]

Just as it did before, North Carolina's "political committee" definition once again regulated issue advocacy discussion. The case of *Community Alliance for a Responsible Environment v. Leake*[130] illustrates this point. In that case, the State Board of Elections found that Community Alliance for a Responsible Environment ("CARE") was a political committee under section 163-278.6(14) of the North Carolina General Statutes.[131] According to the State Board, CARE was a political committee because it made expenditures to oppose the election of Glen Lang, who was running for mayor in the town of Cary, North Carolina.[132]

As the district court pointed out, "while CARE's advertisements no doubt painted Glen Lang in a poor light, they were *pure issue advocacy*."[133] Yet the Board concluded that these issue advocacy communications qualified CARE as a political committee,[134] basing its decision "upon a number of supporting facts that would qualify as 'contextual' factors under N.C. G.S. § 163-278.14A(a)(2)."[135] The *CARE* court held that although it was possible for the Board to make such a conclusion under the Statutes, "this determination [was] unconstitutional" in this case.[136]

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129. *Id.* at 713.

130. *Cmty. Alliance for a Responsible Env't*, No. 5:00-CV-554-BO(3).

131. *Id.* at 12–13.

132. *Id.*

133. *Id.* at 16 (quoting Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976)) (emphasis added). In fact, the court found that

> [i]n all of its time sponsoring advertisements during the period of the mayoral election and thereafter, CARE never engaged in 'express advocacy' as none of its fliers, printed advertisements, or radio spots 'contain[ed] express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' . . ."

Id.

134. *Id.* at 15.

135. *Id.* at 14.

136. *Id.* at 15–16 (order granting in part and denying in part motion for temporary restraining order and preliminary injunction) (on file with the First Amendment Law Review).

Therefore, the court held that sections 163-278.6(14) and 163-278.14A were unconstitutional as applied to CARE since they "infringe[d] upon CARE's protected right to engage in issue advocacy."[137]

In *North Carolina Right to Life, Inc. v. Leake*, the district court once again held that section 163-278.6(14) was unconstitutional.[138] As discussed earlier, the *Buckley* Court noted that "the distinction between discussion of issues and candidates and advocacy [of issues] and candidates may often dissolve in practical application."[139] Thus, the Court declined to accept a standard that would allow the regulation of a communication that simply discusses a candidate's position on an issue.[140] Therefore, the district court ruled section 163-278.6(14) unconstitutional since it "impermissibly regulate[d] issue advocacy" by relying on section 163-278.14A(a)(2) to determine whether an organization is deemed a political committee.[141]

2. Section 163-278.14A(a)(2) is declared an unconstitutional regulation of issue advocacy since it "clearly violated the 'express advocacy' test."

Section 163-278.14A(a)(2) was used to determine whether an organization acted "to support or oppose the nomination or election of one or more clearly identified candidates" and thus was subject to regulation as a political committee. The Fourth Circuit unequivocally held that the regulation of campaign speech can "be applied consistently with the First Amendment *only* if it [is] limited to expenditures for communications that *literally include words which in and of themselves* advocate the election or defeat

137. *Id.* at 17.

138. N.C. Right to Life, Inc. v. Leake, No. 5:99-CV-798-BO(3), at 7 (E.D.N.C. Oct. 24, 2001) (order granting plaintiffs' motion for summary judgment and denying defendant's motion for summary judgment) (on file with the First Amendment Law Review).

139. 424 U.S. 1, 42 (1976).

140. *Id.* at 43–44; *see also* Perry v. Bartlett, 231 F.3d 155, 160 (4th Cir. 2000); *supra* Part I.C.2.

141. *N.C. Right to Life*, No. 5:99-CV-798-BO(3), at 7.

of a candidate."[142] In fact, "[t]he Fourth Circuit has steadfastly adhered to the bright-line 'express advocacy' test from *Buckley*"[143] and has expressly repudiated looking beyond express or explicit words advocating the election or defeat of a candidate.[144] Other circuit court decisions addressing the regulation of issue advocacy "have categorically rejected any attempt to dilute the bright-line express advocacy standard."[145]

Notwithstanding the constitutional sanctity of issue advocacy, like Congress did this year when it adopted the BCRA, the 1999 North Carolina General Assembly adopted section 163-278.14A, a law that regulates issue advocacy.[146] NCRL argued

142. FEC v. Christian Action Network, 110 F.3d 1049, 1051 (4th Cir. 1997) (emphasis added); *see also Perry*, 231 F.3d at 160.

143. *Perry*, 231 F.3d at 160.

144. *See Christian Action Network*, 110 F.3d at 1064.

145. *Perry*, 231 F.3d at 161; *see also supra* notes 66–67.

146. It was the full intention of the General Assembly to regulate advertisements that avoided express or explicit words of advocacy but had the intention of electing or defeating a candidate. These types of advertisements were commonly referred to by the statute's proponents as "sham" or "phony" issue ads. *See Hunt Signs Reform Law,* GOLDSBORO NEWS-ARGUS, Aug. 13, 1999, at 5A. In fact, Senator Gulley, the lead sponsor of the Senate legislation that contained section 163-278.14A, confirmed this legislative purpose at his deposition. *See* Deposition of Wilbur Paul Gulley at 63, 99–100, N.C. Right to Life, Inc. v. Leake, No. 5:99-CV-798-B0(3) (E.D.N.C. Oct. 24, 2001) (on file with the First Amendment Law Review). Further, when asked why he and the General Assembly did not stop at the first paragraph, section 163-278.14A(a)(1), instead of including subsection 14A(a)(2) within the regulatory ambit, Gulley admitted that "(a)(1) doesn't in my judgment do much more than recite existing federal law, so that is already the law. The effort was to acknowledge that statutorily, but then go on to try and reach beyond that to—again, to express advocacy that is masquerading as issue advocacy." *Id.* at 66, 101–02; *see also* Deposition of Philip A. Baddour at 73–74, 77, N.C. Right to Life, Inc. v. Leake, No. 5:99-CV-798-BO(3) (E.D.N.C. Oct. 24, 2001); Deposition of Gary Osborne Bartlett at 17, N.C. Right to Life, Inc. v. Leake, No. 5:99-CV-798-BO(3) (E.D.N.C. Oct. 24, 2001) (on file with the First Amendment Law Review). The State claimed that section 163-278.14A(a)(2) is a proper regulation of "covert speech"—speech that promotes a candidate and his position on issues but "shrewd[ly] and evasive[ly]" avoids express or explicit words. Defendant's Response to Plaintiff's Memorandum in Support of Their Motion for Summary Judgment and Reply to Plaintiff's Amended Response to Defendant's Motion for Summary Judgment at 17, N.C. Right to Life, Inc. v. Leake, No. 5:99-CV-

that the consideration of such factors, beyond express or explicit words of advocacy, could lead to arbitrary and subjective enforcement by the Board. In fact, Gary Bartlett, the Board's Executive Director, confirmed this possibility:

> We have had a lot of discussion about 14A and have had speculation and what ifs. If I have to say of all the things that is in this article, that is certainly the area that gives us the biggest headache.... Because it is very subjective and you basically need the Board in specific cases to act as a–make a judicial determination.[147]

Director Bartlett recognized that under subsection (a)(2) a speaker could not tell from the face of the communication whether it "supports or opposes" the nomination or election of a candidate, but instead, the speaker was forced to look at what other activities were taking place.[148] North Carolina House Majority Leader Philip Baddour correctly noted that "[t]here is nothing in the

798-BO(3) (E.D.N.C. Oct. 24, 2001). The State contended that section 163-278.14A(a)(2) properly regulated communications "that can only be understood by a reasonable listener/reader to be an exhortation to take electoral action." *Id.* at 18. However, "regulation of campaign speech [is only permissible] when there are words of express advocacy in the communication itself." *Perry*, 231 F.3d at 161.

147. Deposition of Bartlett at 58, *N.C. Right to Life* (No. 5:99-CV-798-BO(3)).

148. *Id.* at 18–20; *see also* Deposition of Baddour at 82–84, *N.C. Right to Life* (No. 5:99-CV-798-BO(3)). Because of the uncertainty created by subsection (a)(2), North Carolina State Senator Gulley suggested that an individual suppress his speech by choosing "some margin of error to be on the safe side." Deposition of Gulley at 69, *N.C. Right to Life* (No. 5:99-CV-798-BO(3)). Such a suggestion, in and of itself, runs afoul of the First Amendment. *See* Buckley v. Valeo, 424 U.S. 1, 14 (1976) ("Discussion of public issues and debate on the qualification of candidates are integral to the operation of the system of government established by our Constitution."); *see also Perry*, 231 F.3d at 160 (citing *Buckley*, 424 U.S. at 42) ("[T]o alleviate uncertainty, the Supreme Court adopted a bright-line rule to determine when political expression may be regulated," requiring "the use of express or explicit words of advocacy . . . before the communication may be regulated.").

statute that limits the trier of fact from taking anything into consideration."[149]

According to Director Bartlett, "each circumstance[] must be looked at on an individual basis. You cannot have a cookie cutter approach to everything *except for express advocacy.*"[150] Director Bartlett's admission recognizes that subsection (a)(2) did not provide the clear bright-line, which subsection (a)(1) provides, so that a speaker will know from the outset whether his speech supports or opposes the election or defeat of a candidate. In holding that the inclusion of express words of advocacy were constitutionally required before a communication could be regulated, the Supreme Court in *Massachusetts Citizens For Life, Inc.* pointed out that express or explicit words of advocacy were also indispensable in identifying express advocacy.[151]

The "essential nature" test permitted the Board to ignore whether a communication uses express or explicit words of advocacy[152] and allowed the Board to arbitrarily decide what speech fell within the regulatory ambit of subsection (a)(2).[153] Allowing the Board to focus on the "essential nature" of the communication, rather than the words, unacceptably burdens issue

149. Deposition of Baddour at 57, *N.C. Right to Life* (No. 5:99-CV-798-BO(3)).

150. Deposition of Bartlett at 20, *N.C. Right to Life* (No. 5:99-CV-798-BO(3)) (emphasis added).

151. 479 U.S. 238, 249 (1986); *see also* Citizens for Responsible Gov't State PAC v. Davidson, 236 F.3d 1174, 1187 (10th Cir. 2000).

152. *See* Cmty. Alliance for a Responsible Env't v. Leake, No. 5:00-CV-554-BO(3), at 7 (E.D.N.C. Feb. 18, 2001) (order granting in part and denying in part motion for temporary restraining order and preliminary injunction) (on file with the First Amendment Law Review).

153. Director Bartlett admitted that even in cases where there were "no such 'express words of advocacy' were present, the Board might nonetheless find that a communication constituted express advocacy if its essential nature was unclear." N.C. Right to Life, Inc. v. Leake, No. 5:99-CV-798-BO(3), at 8 (E.D. N.C. Oct. 24, 2001) (order denying motion for summary judgment) (citing Deposition of Gary Bartlett at 38) (on file with the First Amendment Law Review). He further noted that "it is the cumulative whole that lets you use [subsection (a)(2)] or not . . . including the timing[] [and] the amount of money spent in a specific period of time." *Id.*

advocacy communications, which is "an area of such crucial import to our representative democracy."[154]

Further, a look at the contextual factors, when the course of action is unclear, goes beyond the constitutional mandate. Factors contextually external to the words actually expressed are irrelevant to whether a communication expressly advocates the election or defeat of a candidate. If a course of action is unclear, it is just that. Reference to factors beyond the words actually said violates the "bright–line rule." The consideration of the aforementioned factors shifts the focus to factors beyond the words actually said.

If the Board were permitted to look at the timing of the communication as a determining factor, then the speaker would never truly know if his speech fell within the regulatory ambit of North Carolina's statutory scheme. The federal district court in Maine recognized the problem of looking at timing as a determining factor: "[w]hat is issue advocacy a year before the election may become express advocacy on the eve of the election

154. N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 713 (4th Cir. 1999). The "essential nature" language employed in section 163-278.14A(a)(2) of the North Carolina General Statutes was borrowed from the Supreme Court's holding in *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). In that case, the Court evaluated a publication that "urges voters to vote for 'pro-life' candidates" and "identifies and provides photographs of specific candidates fitting that description." *Id.* at 249. The Court held that, while this communication was "marginally less direct than 'Vote for Smith," this "does not change its essential nature," which the Court held to be express advocacy of the election of particular candidates. *Id.* The express advocacy nature of the communication in *Massachusetts Citizens for Life* was marginally indirect only because the clearly identified candidates and the clear plea to vote for them were not contained within the same sentence, but, nonetheless, within the four corners of the communication at issue. The problem with the North Carolina legislature's use of the "essential nature" language is that the type of communication at issue in *Massachusetts Citizens for Life* would actually fall under subsection (a)(1), which lists uncontroverted illustrations of express advocacy: " 'Vote pro-(policy position)' or 'vote anti-(policy position)' accompanied by a list of candidates clearly labeled 'pro-(policy position).' " N.C. GEN. STAT. § 163-278.14A(a)(2) (1999). Subsection (a)(2) covered more than the marginally indirect sort of express advocacy at issue in *Massachusetts Citizens for Life*. The mere fact that it was unclear as to what communications were covered in subsection (a)(2) demonstrates that it does not provide the bright line required to avoid the stifling of political speech. *See supra* I.C.2.

and the speaker must continually re-evaluate his or her own words as the election approaches. That is sufficient evidence of First Amendment 'chill' to entitle the plaintiffs to relief."[155]

Likewise, if the Board were permitted to focus on factors such as the cost of the communication and the audience receiving the communication, a speaker would be akin to a blind person on a busy street with no seeing eye dog—the speaker would never know when he fell within the purview of danger. It would compel "the speaker to hedge and trim."[156] That is why the Supreme Court drew a bright line that errs on the side of "permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues."[157] Under this rigid approach, the speaker or writer has the advantage of knowing before the communication is made whether it is permitted or prohibited.[158]

Subsection (a)(2) blurred the bright-line even more where it allowed a "reasonable person" to evaluate the context of the communication to determine if it advocates the election or defeat of a candidate. Director Bartlett even suggested that a "reasonable person" standard "is very subjective."[159] More importantly, a reasonable person's understanding of the communication is simply irrelevant, and allowing such a standard violates *Buckley's* bright and clear line, which is intended to allow the speaker to know in advance of speaking whether his communications can be regulated.[160] The *Buckley* Court created the express advocacy test so that a court's inquiry would focus on the *language* used in the

155. Me. Right to Life Comm. v. FEC, 914 F. Supp. 8, 13 (D. Me. 1996), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996).

156. Buckley v. Valeo, 424 U.S. 1, 43 (1976) (quoting Thomas v. Collins, 323 U.S. 516, 535 (1945)).

157. *Me. Right to Life Comm.*, 914 F. Supp. at 12.

158. *See id.*

159. Deposition of Gary Osbourne Bartlett at 21, N.C. Right to Life, Inc. v. Leake, No. 5:99-CV-798-BO(3) (E.D.N.C. Oct. 24 2001) (on file with the First Amendment Law Review).

160. Iowa Right to Life Comm. v. Williams, 187 F.3d 963, 969 (8th Cir. 1999) ("Questions of intent and effect . . . are to be excluded from the [express advocacy] analysis, since a speaker, in such circumstances, could not safely assume how anything he might say would be understood by others.").

communication.[161] Otherwise, the speaker would be "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning."[162]

C. *North Carolina's Third Attempt*

In another attempt to regulate issue advocacy, the North Carolina General Assembly enacted section 163-278.12A of the North Carolina General Statutes.[163] This section required any entity making expenditures for printed material or advertisements that name candidates with the intention of advocating such candidates' election or defeat to report such expenditures to the State Board of Elections as soon as such expenditures exceeded an aggregate threshold of $3,000.[164]

Farmers for Fairness ("Farmers"), an agricultural nonprofit organization, brought an action challenging the constitutionality of subsection 12A.[165] Farmers alleged that its purpose was to educate the public, officeholders, and candidates on issues relating to the agricultural and farming industries.[166] In order to effectuate this purpose, Farmers provided the public with candidates' and/or officeholders' positions on issues affecting agriculture and farming but did not make communications expressly advocating the election or defeat of a candidate.[167]

Acting in accordance with its purpose, Farmers purchased advertising that was critical of certain members of the North Carolina House of Representatives but did not expressly advocate their defeat.[168] After receiving complaints from the named

161. *Buckley*, 424 U.S. at 43; *see also* Perry v. Bartlett, 231 F.3d 155, 161 (4th Cir. 2000).

162. *Buckley*, 424 U.S. at 43 (quoting Thomas v. Collins, 323 U.S. 516, 535 (1945)).

163. N.C. GEN. STAT. § 163-278.12A (1999).

164. § 163-278.12A (referring to section 163-278.10A for $3,000 aggregate expense amount).

165. *Perry*, 231 F.3d at 159.

166. *See id.* at 158.

167. *See id.* at 159.

168. *See id.*

candidates, the Board found that Farmers acted with the intent to oppose the re-election of certain candidates, and in turn, violated the reporting requirements in subsection 12A.[169] The Board ordered Farmers to register as a political committee and comply with a panoply of burdensome requirements simply because it engaged in issue advocacy.[170] The district court ruled that the constitutionality of subsection 12A was mooted.[171] On appeal, the Fourth Circuit held that the district court erred in its ruling.[172]

The Fourth Circuit unequivocally held that the Supreme Court's "bright-line rule requires the use of express or explicit words of advocacy of the election or defeat of a candidate before the communication may be regulated."[173] The court stated that this is so even if the speaker admits that the purpose of the issue advocacy communication is to defeat a particular candidate.[174] The Fourth Circuit expressly rejected the State's argument that there should be an exception to the "express advocacy" test when the entity admits, outside of the communication, that it is trying to defeat a particular candidate.[175]

The court observed that allowing the regulation of issue advocacy when the speaker acknowledges an intent to influence the outcome of an election "would create a legal standard that would be the antithesis of the bright-line express advocacy test developed in *Buckley*."[176] Consequently, the court held section 163-278.12A of the North Carolina General Statutes

169. *Id.* at 159.
170. *See id.*
171. *Id.* at 160.
172. *See id.*
173. *Id.*
174. *See id.* at 161-62.
175. *See id.*
176. *See id.* at 161. As the court noted:

> The Supreme Court developed the express advocacy test to focus a court's inquiry on the language used in the communications; any other test would leave the speaker "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning."

Id. (quoting Buckley v. Valeo, 424 U.S. 1, 43 (1976)).

"unconstitutionally overbroad" and "permanently enjoined [the State] from enforcing it" since it "would allow the regulation of issue advocacy."[177]

CONCLUSION

What have we learned from *Buckley* and its progeny? Without a doubt, issue advocacy communications cannot be prohibited. But that is not all; issue advocacy communications cannot even bear a scintilla of regulation. Any attempts to regulate such sacred speech will be declared unconstitutional and will result in a waste of government resources and taxpayers' money.

What have we learned from the reformers? They want to stifle the American citizenry's speech on political issues at the most crucial time, immediately before an election. This is because reformers are under the misapprehension that an election is their election and their right to be free from criticism on television or radio outweighs the citizenry's First Amendment right to hold them accountable. To steal a word from the reformers, this is a "sham."[178]

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177. *See id.* at 162.

178. In discussing the Shays-Meehan bill, House Majority Leader Tom Delay accurately stated,

> This is a sham. It shuts down the system . . . . It shuts down political speech. It shuts down the opportunity to participate in elections. In a country the size of the United States, an individual citizen has very little chance of joining the political debate without banding together with others, so by blocking citizens' groups from participating in days leading up to an election, Shays-Meehan removes a very vital tool that citizens can use to hold elected officials accountable.
>
> . . . .
>
> This is Swiss cheese. It is full of holes. It does not do what the authors want. It is like a fine wine that does not get better with age, it just rots.

148 CONG. REC. H339-02, H342 (daily ed. Feb. 12, 2002) (statement of Rep. Delay).